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No. 96-1399

In The

Supreme Court of the United States

October Term, 1996

UNITED STATES OF AMERICA ex rel. Don H. Haycock,

Petitioner,

v.

HUGHES AIRCRAFT COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF TO BRIEF IN OPPOSITION

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REPLY BRIEF TO BRIEF IN OPPOSITION

Pursuant to Rule 22.5 of the Rules of the Superior Court of the United States, petitioner on behalf of the United States submits this reply brief addressed to arguments first raised in the Brief in Opposition submitted by Hughes Aircraft Company.

The purpose of this brief is to correct mistaken assertions presented in the Hughes Aircraft Company's Brief in Opposition; and, to affirm that the Brief in Opposition is further proof that there is no factual dispute, only a dispute as to the applicable law by which overhead labor may lawfully be charged directly to government contracts.

MISTAKEN ASSERTIONS

Specifically the Brief in Opposition makes the following mistaken assertions:

1. that, " . . . missing from the petition [for writ of Certiorari] was the District Court's order Granting Summary Judgment, . . . and several key portions of the District Court's order regarding the parties' motions for summary judgment . . . Thus Petitioner omits from the record the most critical portions of the order his petition questions." (page 2)

Petitioner's Response: Petitioner *did include* in the Petition for Writ of Certiorari (hereafter "Petition") the District Court's order Granting Summary Judgment as Appendix No. 3 (page App. 5). However, Petitioner did

not include irrelevant assertions regarding admonishment for failure to comply with certain local rules; and, an irrelevant footnote following Paragraph No. 1 regarding the trial court's reason for not acting on a motion to dismiss portions of the second amended complaint. The exclusion of both these provisions was indicated by omission designation. Irrelevant matter was also excluded in other Appendices in the Petition, as so indicated, to reduce the bulk of the Petition.

The brief in opposition further asserts that Petitioner omitted from this Summary judgment order, " . . . the most critical portions of the [summary judgment] order his petition questions."

Since this complete summary judgment order was included at page "1a" in the Appendix of the Brief in Opposition, the court will note that there were no "critical portions of this order" not included in the Petition. Hughes does not state what these "most critical portions" allegedly omitted are, because there are none.

2. That the declarations of the two government officials [Slater and Brunmier] " . . . reviewed and approved the CAS disclosure statements and its direct allocation pool charging system for the employees in question." (page 6)

Petitioner's Response: As the Petition states, Slater's and Brunmier's approval of the CAS Disclosure Statement and the direct allocation pool (system) is not disputed, is admitted, and is not an issue. By making this assertion Hughes in implying that these two government officials approved the contested labor-charging practice *that is* the ultimate issue of this lawsuit. As the Petition

proves, an examination of the declarations of these "government officials" reveals that they *did not* approve of the Hughes' labor charging practice. (*see* pages App. 37 and 64 in the Petition) The declarations of these officials unequivocally proved that charging the labor of overhead employees directly to government contracts must be in compliance with the mandated Federal Regulations expressed and referenced in their declarations. The Hughes practice disregarded these Federal Regulations as the declaration of Hughes Controller Robert Meyers and Hughes's attorney James J. Gallagher freely admit. (*see* pages 17 and App. 57 in the Petition) Hughes has also admitted this in its Brief in Opposition.

3. The Brief in Opposition mistakenly states that prior to the submittal of the declaration of Petitioner's expert witness, Peter Elliott, " . . . [petitioner] continued to rely solely on his own misguided interpretation of the government officials' declarations [Brunmier's and Slater's], the disclosure documentation submitted by Hughes, and the federal regulations and Cost Accounting Standard." (page 6)

Petitioner's Response: The record before both the trial court and the Ninth circuit are proof that Hughes' failure to comply with mandated Federal Regulations and Cost Accounting Standards was *not* first presented by Elliott's declaration. As Hughes acknowledges, the Federal Regulations and Cost Accounting Standards expressed and argued in Elliott's declaration *had been* previously presented and argued in written briefs to the trial court; and provided to the Ninth Circuit in petitioner's Excerpts of Records ("ER"): Specifically:

Federal Regulations (Cost Accounting Standards)	Excerpts-of-Record Pages
52-230-4&5	333, 337, 351, 357, 370, 391 and 393
351.60	216
331.60	237m, 237p, 237q, and 237v.
401.20	237n,
401.40	237n and 237v.
418	225

This is confirmed by the trial court's statement that: [Peter Elliott's declaration] " . . . consists mostly of a review of the evidence already presented to this court, . . . " (*see* page App. 14 in the Petition) Clearly, the trial court mistakenly concluded that mandated compliance with these Federal Regulations and Cost Accounting Standards was not relevant; and, that Item 2.5.0 in Hughes' CAS Disclosure Statement authorized this unlawful labor-charging practice in which Hughes unlawfully engaged. (*see* page App. 7 in the Petition)

4. The Brief in Opposition mistakenly states "[Haycock] never specifically identified either by name or by job category which employees supposedly were not covered . . . " (page 7)

Petitioner's Response: Names and job categories of numerous employees were identified to both the trial court and the Ninth Circuit in petitioner's Excerpts of Record. However, they were not included in this petition for two reasons: 1). petitioner and Hughes filed a stipulation with the trial court bifurcating liability from damages (Excerpts of Record, page 330); and, 2). the identification of these employees went to the issue of

damages. The trial court disposed of this case on the liability issue alone.

However, based on the discovered tab-runs of the Direct-Labor Allocation Pool (System), the following employees, and their overhead job categories, were identified to both Hughes, the trial court and the Ninth Circuit, in the Excerpts of Records ("ER"):

Secretarial Classifications: Jo Ann Cannon, Inez Santiago, Sandy Jacobson, Edith Chaplin, Jeanie Vaughn, Phyllis Jackson, Ann Campbell. (ER 237j)

Non-Technical Managers: Chas. F. Brown, Robert Hochhalter, Dave McEntytre, Nancy L. Richardson, Donald L. Chambers. (ER 237L). Also, Thomas F. Brands, James H. Brill, William T. Coffman, Jack J. Rafelson, Loren K. Glassen, David M. Goran, Jeffery B. McConnell, Robert E. McIntyre, Lavon P. Thorose, Linda L. Zeise (ER 241 to 246)

Business Administrators: Donald L. Nickles, Robert J. Kessler, E.J. Quay. (ER 244 & 245)

Training Supervisor: Nancy C. Norris (ER 245)

Personnel Administrator: Kimberle Perkins (ER 245)

Although this is not an exclusive listing, these are specific employees in overhead job categories, which is not disputed, whose labor is being charged directly to government contracts via the Direct Labor Allocation Pool, as direct labor, without being reclassified in compliance with the mandated Federal Regulations. Accordingly, their labor is being clandestinely charged to the government as direct labor, without notice to the government, in the manner described by Hughes Controller

Robert Meyers and attorney James J. Gallagher. *see* pages 17 & 57 in the Petition) This practice unlawfully subjects overhead labor to the 155 to 173 percent burden that should only be applied to direct labor; and, from which overhead labor is funded. (*see* page 8 of the Petition) This labor-charging practice is confirmed by Hughes in the Brief in Opposition.

5. The Brief in Opposition mistakenly asserted that: "The court also found that Hughes' evidence showed that its CAS Disclosure Statement properly disclosed its charging practice to the responsible government officials [Brunmier & Slater]" (pages 7 & 8)

Petitioner's Response: The declarations of Brunmier and Slater, and Peter Elliott's declaration, all mandate that the reallocation of overhead labor to direct labor *must be in compliance with the mandated Federal Regulations* as presented in the Petition and as a reading of these declarations will reveal. (*see* pages 14, 37 and 64 in the petition) Hughes did not comply with these federal regulations. There is no evidence in Brunmier's and Slater's declarations that they were even aware of the Hughes' labor-charging practice that violated these Federal Regulations.

6. The Brief in Opposition mistakenly states that, " . . . during oral argument before the Ninth Circuit, Mr. Haycock conceded [page 24 in the petition] that there was no evidence in the record (other than his expert's declaration which was not in the record below) to contradict the government officials' declarations." (page 10)

Petitioner's Response: The Court will note that this is not what was stated on page 24 of the Petition, as Hughes

claims. As stated on page 24, and throughout petitioner's opening brief, the declarations of Brunmier and Slater *are not disputed*. They confirm both the declaration of petitioner's expert Peter Elliott and the declaration of Hughes' controller Paul Hendrick, as expressed on this page during oral argument. They also confirm the applicability of the Federal Regulations presented to the trial court by petitioner prior to Elliott's declaration. The ultimate issue is that Hughes was not complying with the mandated Federal Regulations expressed in these declaration – *which Hughes has acknowledged*.

Further, Hughes has failed to produce any authority that supports its charging overhead labor directly to government contracts based solely on Section 2.5.0 in its CAS Disclosure Statement. (Brief in Opposition, page 5) The declarations of Brunmier and Slater do not support this practice, as an examination of their declarations will confirm. Even as a current Hughes employee, Brunmier would not make any declaration to the lawfulness of the their labor-charging practice.

7. The Brief in Opposition asserts that Petitioner improperly filed with the Ninth Circuit a bill for costs, claiming he was not the prevailing party. (page 10).

Petitioner's Response: This is a mistaken assertion; Petitioner was the prevailing party on a published opinion by the Ninth Circuit regarding rights of the government to intervene. Accordingly, the clerk of the court requested that Petitioner file a cost bill, which was done.

CONCLUSION

The Brief in Opposition conclusively affirms the issue this court is requested to decide. Specifically, whether Hughes may charge the labor of overhead employees directly to government contracts based solely on Item 2.50 in the CAS Disclosure Statement, without notice to the government and without any compliance with mandated Federal Regulations. This issue must be decided against Hughes. Hughes has cited no authority in support of this labor-charging practice. Conversely, all expert testimony cited on this issue hold that compliance with Federal Regulations is mandatory.

Accordingly, petitioner requests the court to find against Hughes on liability and mandate this case to the district court for proof of damages.

Respectfully submitted,

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Petitioner and Relator on behalf of the United States Government

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